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Supreme Court, U.S.
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In The

Supreme Court of the United States

LOCAL 227, UNITED FOOD AND COMMERCIAL WORKERS UNION,

Petitioner,

v.

WYANDOT, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER THE COURT OF APPEALS ERRED BY APPLYING THE WRONG STANDARD FOR REVIEWING AN ARBITRATOR'S PROCEDURAL DECISIONS WHEN IT AFFIRMED THE DISTRICT COURT'S JUDGMENT VACATING THE ARBITRATION AWARD?

2. WHETHER THE COURT OF APPEALS ERRED WHEN IT HELD THAT THE ARBITRATION AWARD DEPARTED FROM THE ESSENCE OF THE AGREEMENT?

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PETITION FOR WRIT OF CERTIORARI

Local 227 United Food and Commercial Workers Union ("Local 227") respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on March 9, 2000 which affirmed the judgment of the United States District Court for the Western District of Kentucky at Louisville vacating the arbitration award issued by Arbitrator Fred Witney ("Witney Award").

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit that gives rise to this Petition is *Wyandot, Inc. v. Local 227, United Food and Commercial Workers Union*, 205 F.3d 922 (6th Cir. 2000), and is set forth in the Appendix hereto. (App. 1-19) The Memorandum Opinion of the United States District Court for the Western District of Kentucky at Louisville in *Wyandot, Inc. v. United Food and Commercial Workers Union, Local 227*, Case No. 3:97-CV-785-H (W.D. Ky. filed Dec. 3, 1999) is unreported and set forth in the Appendix hereto. (App. 20-38)

JURISDICTION

On December 3, 1998 the United States District Court for the Western District of Kentucky at Louisville issued a Memorandum Opinion and Order vacating the Witney Award and denying Local 227's counterclaim to enforce

the Witney Award and the Arbitration Award issued by Arbitrator Edward P. Archer ("Archer Award"). On December 14, 1998 Local 227 filed a timely Notice of Appeal to the United States Court of Appeals for the Sixth Circuit, which affirmed in an Opinion filed on March 9, 2000 the district court's judgment vacating the Witney Award. Pursuant to Supreme Court Rule 13.1, this Petition has been filed within 90 days of the Sixth Circuit's decision.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTES INVOLVED IN THIS CASE

Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185(a): Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Local 227 and Wyandot, Inc. ("Wyandot") are parties to a Collective Bargaining Agreement ("CBA") which provides for final and binding arbitration of disputes, including the discharge of employees. Sue Pollard, a

member of Local 227, was discharged by Wyandot. Local 227 filed a grievance over Pollard's discharge which was submitted to arbitration before Arbitrator Fred Witney.

At the arbitration hearing Wyandot asserted the procedural defense that Pollard's grievance was untimely filed. Arbitrator Witney rejected Wyandot's timeliness defense and found that Local 227's July 1 letter advising Wyandot of its intent to arbitrate Pollard's grievance overcame any procedural defects that may have existed. (App. 54-55)

On the merits, Arbitrator Witney found that Wyandot violated the CBA by discharging Pollard for attendance occurrences, which included the January 8 occurrence that Arbitrator Archer had ordered removed. (App. 67) Although Wyandot argued that the Archer Award somehow did not apply to Pollard, Arbitrator Witney rejected that contention. (App. 61-62) The Witney Award required that Wyandot reinstate Pollard "and to make her whole for all wages and contractual benefits she lost during the period of her wrongful termination." (App. 68)

In a summary of his conclusions, Arbitrator Witney wrote: "**Nor does the Arbitrator violate the parameters of his authority as established by Section 6.7 of the Labor Agreement. In no way has he ignored, added to, or modified any terms or provisions of the contract.**" (App. 66) (emphasis supplied). Despite Local 227's repeated demands, Wyandot refused to comply with the Witney Award and, instead, filed suit to vacate the Award. Local 227 filed a counterclaim to enforce both the Archer Award and Witney Award.

The district court vacated the Witney Award because it found that the Witney Award failed to draw its essence from the CBA when Arbitrator Witney determined that the July 1 letter cured any procedural defects. (App. 36) In vacating the Witney Award, the district court applied the standard set forth in *Dobbs Inc. v. Local 614, Int'l. Brotherhood of Teamsters*, 813 F.2d 85 (6th Cir. 1987) which listed four ways that an arbitrator may depart from the "essence of the collective bargaining agreement". (App. 29)

On appeal, the Sixth Circuit affirmed, holding that the district court applied the proper standard and rejected Local 227's argument that the Witney Award should have been reviewed under the stricter standard for reviewing "procedural" decisions, wherein an arbitration award may be set aside only if the arbitrator acted in "bad faith" or was guilty of "affirmative misconduct." *United Paperworkers Int'l. Union v. Misco*, 484 U.S. 29, 40 (1987). In this regard, the Sixth Circuit wrote:

> Accordingly, the Union's reliance on the "procedural" standard of review set forth in *Misco* is misplaced. In *Misco*, the matter at issue was subject to arbitration, and – after finding that the matter was arbitrable – the Supreme Court reviewed the arbitrator's "procedural" decisions relating to the merits of the dispute. In the instant matter, the Company challenges whether the matter is arbitrable. The district court found that the Pollard dispute was not arbitrable and therefore never examined the arbitrator's "procedural" decisions. Thus, the standard of review set forth in *Misco* was not applicable to the instant matter. (footnote omitted). (App. 12)

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit Erred Because It Applied The Wrong Standard For Reviewing Arbitrator Witney's Procedural Decision That Local 227's July 1 Letter Cured Any Procedural Defects.

At the arbitration hearing, Wyandot asserted a procedural defense claiming that the grievance was untimely under Section 6.2 of the CBA.[1] Arbitrator Witney rejected Wyandot's timeliness defense. The Arbitrator found that Local 227's July 1 letter advising Wyandot of its intent to arbitrate Pollard's grievance overcame any procedural defects that may have existed. (App. 54-55)

The Sixth Circuit erred when it affirmed the judgement of the district court which applied the incorrect standard for reviewing procedural decisions of arbitrators. The Sixth Circuit held that in order to make a "procedural" decision, "it must previously be determined that the matter at issue is subject to arbitration." (App. 12) The Sixth Circuit relied on this Court's decision in

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[1] The CBA has a grievance procedure, which the parties verbally modified. The unwritten modified grievance procedure provides that discharge grievances are initially processed at Section 6.1, Step C, of the grievance procedure, while all other grievances are initially filed at Section 6.1, Step A. (App. 3, 33, 49) However, unlike Section 6.2, which establishes the time limit for filing grievances under Section 6.1, Step A, Section 6.1, Step C, does not contain any time limit for the initial filing of grievances and the parties did not orally provide one. Accordingly, Local 227 argued below that the CBA was not clear and unambiguous as regards the time and procedure for filing discharge grievances and, therefore, the district court erred in finding that Arbitrator Witney ignored clear contract language.

John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557-58 (1964), wherein the Supreme Court held that "[o]nce it is determined . . . that the parties are obligated to submit the subject matter to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *Id.* Thereafter, the Sixth Circuit incorrectly held that the higher and more deferential standard for reviewing "procedural" decisions set forth in *Misco, supra*, was not applicable because the Pollard grievance was not arbitrable. (App. 12) The Sixth Circuit, in this regard, incorrectly applied this Court's opinions in *John Wiley, supra* and *Misco, supra*. The issue of whether a grievance was "arbitrable" in those cases centered around whether or not there was **subject matter** jurisdiction over the grievance, whether "the parties are obligated to submit the subject matter [of the grievance] to arbitration". *John Wiley*, 376 U.S. at 557-58. In this case, the subject matter of the dispute was Pollard's discharge, which was clearly covered by the parties' CBA. There was no challenge in arbitration by Wyandot as to Arbitrator Witney's subject matter jurisdiction. What was challenged by Wyandot was a "procedural" matter; that is, whether Local 227 timely filed Pollard's discharge grievance. Arbitrator Witney's decision in this regard, right or wrong, involved a "procedural" dispute, as much a "procedural" dispute as in *Misco* where the arbitrator did not consider certain evidence. In error, the district court and the Sixth Circuit applied the *Dobbs* standard for determining whether or not the Witney Award drew its essence from the CBA. The courts below found that the Witney Award did not because it ignored the procedural requirements for timely

filing grievances. However, Arbitrator Witney's "procedural" decision should have been reviewed, not according to the *Dobbs* standard, but whether it was in "bad faith" or "so gross as to amount to affirmative misconduct." *Misco*, 484 U.S. at 40. In sum, in affirming the decision to vacate the Witney Award, the Sixth Circuit departed from established Supreme Court precedent which required evidence of "affirmative misconduct" or "bad faith" by Arbitrator Witney, of which there is none alleged in this case.

II. The Sixth Circuit Erred Because It Incorrectly Found That The Witney Award Departed From The Essence Of Agreement.

As a threshold matter to finding that an arbitration award departed from the essence of a collective bargaining agreement on the basis that the arbitrator construed unambiguous contract language, it must be found that the written words departed from were "plain and unambiguous". *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). The Sixth Circuit acknowledged[2] that Local 227 and Wyandot mutually agreed to orally modify the grievance procedure by filing discharge grievances at Section 6.1, Step C, instead of at Section 6.1, Step A. Yet, the Sixth Circuit held that the Witney Award departed from the essence of the CBA because it, (1) is in "conflict[s] with the **express** terms of the Agreement"; (2) "imposes additional requirements not **explicitly** provided for in the Agreement";

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[2] See footnote 5 in the Circuit Court's Opinion. (App. 16)

and, (3) "ignore[d] the Agreement's deadlines". (App. 15-17) (emphasis supplied) Despite the Sixth Circuit's references to "express" and explicit terms in the Agreement, Step C does not contain any time limit for filing discharge grievances and the parties never provided for one when it orally modified the grievance procedure. Thus, contrary to the Sixth Circuit's opinion, there is no written term in the CBA that was ignored or departed from by Arbitrator Witney, let alone a "plain and unambiguous" contract term. Accordingly, even under the *Dobbs* standard, it cannot be said, as found by the Sixth Circuit, that the Witney Award is in conflict with or ignored express terms of the CBA, or imposed additional requirements not expressly provided for in the CBA, since none exist concerning the time limits for filing discharge grievances at Step C.

In addition, the Sixth Circuit erred when it held that the Witney Award departed from the essence of the CBA because Arbitrator Witney "provided no support in the Agreement for finding the grievance arbitrable." (App. 17) Arbitrator Witney's finding that the July 1 letter cured any procedural defects is at worst an ambiguity in his reasoning. However, this is not grounds for vacating the Witney Award as it is well settled that arbitrators do not have any obligation to give the reasons for their awards. *United Steelworkers*, 363 U.S. at 597.

Accordingly, the Sixth Circuit erred and is in conflict with established Supreme Court precedent when it held that the Witney Award departed from the essence of the CBA.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

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WYANDOT, INC., Plaintiff/Counter-Defendant-Appellee,

v.

LOCAL 227, UNITED FOOD AND COMMERCIAL WORKERS UNION, Defendant/Counter-Plaintiff-Appellant.

No. 99-5013.

United States Court of Appeals, Sixth Circuit.

Argued Dec. 7, 1999

Decided March 9, 2000

David B. Sandler (argued and briefed), Greenebaum, Doll & McDonald, Louisville, KY, for Plaintiff-Appellee.

Jonathan D. Karmel (argued and briefed), Karmel & Gilden, Chicago, IL, for Defendant-Appellant.

Before: COLE and GILMAN, Circuit Judges; CARR, District Judge.*

OPINION

CARR, District Judge.

This is an appeal from a labor arbitration. Wyandot, Inc. (the "Company") filed suit in the district court to vacate the arbitration award of Arbitrator Fred Witney (the "Witney Award"), which reinstated discharged union member, Sue Pollard. United Food and Commercial

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* The Honorable James G. Carr, United States District Judge for the Northern District of Ohio, sitting by designation.

Workers Union, Local 227, (the "Union") counterclaimed to enforce the Witney Award and also to enforce the arbitration award of Arbitrator Edward Archer (the "Archer Award"), which required the Company to remove absences charged against employees for missed work due to a snow day. The district court vacated the Witney Award and found the Archer Award to be moot regarding the issues presented in this case. The Union appeals pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. For the following reasons, we **AFFIRM** the judgment of the district court.

BACKGROUND

I. The Witney Award

The Witney Award involved the discharge of Sue Pollard, a member of the Union, who was terminated for excessive absences. Under the express terms of the Collective Bargaining Agreement (the "Agreement") between the Company and the Union, a grievance protesting a discharge must be filed in a timely manner or the grievance is barred. The Agreement provides in pertinent part:

> **Article 6**
>
> **GRIEVANCE PROCEDURE AND ARBITRATION**
>
> **Section 6.1** Any dispute, complaints or grievances arising from alleged violations of the Agreement by the Company shall be settled and determined through the following procedure:
>
> Step A: Any Employee and/or steward having a grievance will first attempt to adjust same by

conference between the Employee and/or steward involved and his or her Area Manager.

Step B: If a grievance is not settled in Step A of the grievance procedure, the Employee will next attempt to adjust same with his or her steward and the Department Manager.

Step C: If a grievance is not settled in Step B of the grievance procedure, then ***it shall be reduced to writing*** and the aggrieved Employee, the Steward, and a Union Representative . . . and a designated representative of the Company . . . shall then attempt to settle the grievance.

Step D: If the grievance has not been satisfactorily settled and ***if the grievance is otherwise arbitrable*** under this Agreement, ***it may be referred to arbitration*** . . .

Section 6.2 Any disputes, complaints or ***grievances*** arising from alleged violations of this Agreement by the Company ***shall be deemed, considered and held to have been waived unless the same are presented*** for settlement and determination of Step (A)[1] of the Grievance Procedure of this Agreement within ***five (5) working days*** from the date on which said dispute, complaint or grievance first arose. * * *

Section 6.6 ***All time limits for the processing of grievances, up to and including the actual appeal in writing to arbitration, shall be deemed mandatory requirements and the failure to comply with such specified time limits shall***

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[1] It is undisputed that, in a discharge situation, the parties commence the grievance procedure at Step C instead of Step A. (J.A. 185).

cause the grievance to be barred and considered completely disposed of from the standpoint of the Company, the Union and the Employee or Employees involved. However, it is understood that the parties, through mutual agreement, may extend or waive the time limits of any of the above-mentioned steps of the grievance procedure.

Section 6.7 The function of the Arbitrator shall be of a judicial rather than a legislative nature. ***The Arbitrator shall not have the authority to add to, ignore or modify any of the terms or provisions of the Agreement. The Arbitrator shall never in any degree or to any extent substitute his judgment for the Company's judgment,*** and where matters of judgment are involved (if the case is otherwise arbitrable under this Agreement) he shall be limited to deciding whether or not the Company acted capriciously or in bad faith. . . . ***Subject to the foregoing qualifications and limitations, the Arbitrator's award shall be final and binding*** upon the Company and the Union and the aggrieved Employee or Employees.

Section 6.8 If the Union fails, refuses, or declines to prosecute a grievance on behalf of an Employee, or if the Company and the Union settle any grievance on behalf of an Employee hereunder, the Employee who has filed such grievance or on whose behalf it has been filed shall thereafter be estopped to revive or further prosecute said grievance.

(J.A. 38-39) (emphasis added).

John Holzapel, the Company's Human Resource Manager, mailed a letter to Sue Pollard on May 31, 1996,

notifying her that her employment was terminated because of a violation of the Company's Attendance Policy. (J.A. 176). Although Pollard received the termination letter on June 1, 1996, no written grievance was presented to the Company until June 18, 1996. (J.A. 177). Under the Agreement Pollard was required to present her grievance in writing within five (5) working days of receiving notification of her discharge – *i.e.*, five working days after June 1, 1996. (J.A. 157, 185).

On June 14, 1996, a meeting was scheduled to discuss two other grievances. (J.A. 185). Alex Hernandez, the Union's business representative, and Ben Campbell, the Chief Union Steward, represented the Union at the meeting. (*Id.*). Pollard also appeared at the meeting. (*Id.*). Although Holzapel was surprised to see Pollard, he agreed to listen to what the Union had to say while making it clear that the Company did not agree to waive the time limits for her grievance. (*Id.*). In fact, Hernandez asked Holzapel during the meeting to consider waiving the time limits, but Holzapel refused. (*Id.*). Moreover, at the meeting – thirteen days after Pollard received her termination letter – the Company still had not received a written grievance regarding Pollard's termination. (*Id.*).

Seventeen days after Pollard received her termination letter, on June 18, 1996, the Union submitted a written grievance on her behalf. (*Id.* at 185-186). In response, the Company informed the Union in writing that the grievance was not filed in accordance with the time deadlines set forth in the Agreement and therefore would be denied:

> Grievance 5316, pertaining to Sue Pollard (termination), was not submitted in a timely manner, therefore, grievance is denied. Sue Pollard was terminated on 5/31/96. Grievance was not submitted to Company until 6/18/96.

In addition, the Company denied two other grievances in the same letter because neither had been submitted in a timely manner under the grievance procedure of the Agreement.

On July 1, 1996, the Union mailed a letter to the Company advising it that the Union still was submitting Pollard's grievance to arbitration. (*Id.*). Pollard's grievance was then presented to Arbitrator Fred Witney. Two issues were raised at the hearing: (1) whether the grievance was arbitrable; and (2) if so, whether Pollard was terminated for just cause. At arbitration, the Company maintained that Pollard's grievance was untimely, while the Union asserted that Pollard's discharge did not conform to the Company's No-Fault Attendance Policy.

Arbitrator Witney issued an Award on October 20, 1997, reinstating Pollard. Witney recognized that the Company discharged Pollard effective on May 31, 1996 and that the written grievance protesting her discharge was not filed until June 18, 1996. In addition, Witney acknowledged that "[t]here is no showing that Wyandot has been lax in the enforcement of the time limits. Likewise, no testimony was offered by either side to show that time limits were either waived or extended in this case." (*Id.* at 186). Nevertheless, the Arbitrator deemed the Agreement deadlines inapplicable:

> As said, Wyandot discharged Pollard effective May 30, 1996. ***Accordingly, she or the Union had***

> ***five (5) days (Section 6.2) or ten (10) days (Section 6.1) Step D to file the grievance.*** Since it was not submitted until June 18, 1996, the Company asserts the grievance was not timely and thus not arbitrable. To be sure about it, the Arbitrator fully understands the position of the Company. Scores of decisions demonstrate that enforcement of time limits has frequently been upheld by many arbitrators. Indeed, the published and unpublished cases of the instant Arbitrator are proof positive of his understanding that time limits hold a venerable place in the arbitration process. ***Not for the Union's letter to Wyandot of July 1, 1996, the Arbitrator would have denied Pollard's grievance upholding her termination.***

(*Id.* at 187-188) (emphasis added).

Although Arbitrator Witney recognized that the July 1st letter from the Union (advising the Company that it was proceeding to arbitration) did not meet the time limits set forth in the Agreement, he determined that the letter was "clear and unmistakable notice to Wyandot that the Union intended to arbitrate the Pollard grievance," (*id.* at 188), and "overcomes whatever defects [the Union] has in terms of time limits." (*Id.* at 189). Based on this analysis, Witney ruled that Pollard's grievance was arbitrable. (*Id.*).

The Company subsequently filed suit in the district court to vacate the Witney Award. In examining the Award, the district court recognized that courts have extremely limited authority to review arbitration awards. An arbitrator's factual errors and even misinterpretation

of the Agreement are not subject to judicial reconsideration. An arbitrator is, however, without authority to disregard or modify the plain and unambiguous provisions of the Agreement. (J.A. 48).

The district court then found that the "Union failed to timely grieve Pollard's discharge," and that the arbitrator ignored the Agreement's deadlines "while acknowledging that the Company did not waive the deadline and had not been lax in enforcing the grievance procedure deadlines." (*Id.*) Thus, the lower court concluded:

> [S]imply because the Union and Witney assert that the Witney Award draws its essence from the contract, does not necessarily make it so. The Arbitrator's finding that Pollard's grievance and the July 1, 1996 letter were timely fails to draw its essence from the [Agreement]. Furthermore, the Arbitrator ignored the terms of the [Agreement] in finding the grievance arbitrable. Thus, Arbitrator Witney's award will be vacated.

(*Id.* at 48) (internal citations omitted).

II. The Archer Award

Sue Pollard and other Wyandot employees were considered absent under the Company's no-fault attendance policy for missing work on January 7 and 8, 1996. (Pollard missed only January 8). The Union submitted a class grievance to arbitration before Arbitrator Archer claiming that the absences were due to bad weather and should be excused. On April 18, 1997, Arbitrator Archer agreed and ordered the Company to remove these infractions, including the infraction for Pollard's January 8th absence.

The Company allegedly did not comply with the Archer Award and failed to remove the January 8th absence from Pollard's record. Then, in May 1996, the Company discharged Pollard for excessive absences under its no-fault attendance policy. Under the no-fault policy, employees are terminated after 13 unexcused absences. Pollard had 14 unexcused absences including the January 8th absence.

After the Company filed suit in the district court to vacate the Witney Award, the Union counterclaimed to enforce the Archer Award as well as the Witney Award. The district court, however, held the Archer Award to be moot to the outcome of this case:

> Enforcement of the Archer Award would not change this result. As a result of vacating the Witney Award, the merits of Pollard's grievance and the specific enforcement of the Archer Award are no longer material to this case. Thus, the Union's counterclaim to have the Archer Award enforced is now moot. * * *
>
> Enforcement of the Archer Award with regard to Pollard alone would not have prevented her dismissal. At the time of her discharge, she had fourteen occurrences on her attendance record when only thirteen are necessary to result in termination. Thus, enforcing the Archer Award would have no substantive effect on Pollard. It would only help her if the Witney Award were to be upheld. Presumably, the Archer Award will still have effect in every other applicable circumstance. (J.A. 48, n. 6).

DISCUSSION

The principal issues on appeal are whether (1) the Pollard grievance is arbitrable, (2) Arbitrator Witney's decision draws its essence from the Agreement, and (3) the Archer Award is moot regarding the issues of this case.

The Union argues that the district court erred in vacating the Witney Award because (1) it applied the wrong standard of review, and (2) it improperly substituted its interpretation of the Agreement for that of Arbitrator Witney. Further, the Union contends that the district court erred in finding the Archer Award to be moot even if it properly vacated the Witney Award because the enforcement of the Archer Award affects other remedies available to Pollard.

The Company argues that the district court properly vacated the Witney Award because (1) the Pollard grievance is not arbitrable, and (2) the arbitrator exceeded his authority by disregarding the plain and unambiguous provisions of the Agreement. Thus, according to the Company, the Witney Award did not draw its essence from the terms of the Agreement. Moreover, the Company contends that the district court properly held the Archer Award to be moot because it has no impact on the outcome of this case.

I. Did the District Court Apply the Wrong Standard of Review?

An arbitrator's decision on the issue of arbitrability will be affirmed "unless it fails to 'draw its essence from

the collective bargaining agreement.' " *Vic Wertz Distributing v. Teamsters, Local 1038*, 898 F.2d 1136, 1140 (6th Cir.1990) (citing *Eberhard Foods, Inc. v. Handy*, 868 F.2d 890, 891 (6th Cir.1989)). *See also Interstate Brands v. Chauffeurs, Teamsters Local 135*, 909 F.2d 885, 891 (6th Cir.1990) (holding that a court could overturn an arbitrator's ruling on arbitrability only if it finds that the arbitrator's decision "fails to draw its essence from the collective bargaining agreement").

In the instant matter, the district court vacated Arbitrator Witney's decision under the correct standard – the court found that the Witney Award did not draw its essence from the Agreement. The Union, however, argues that this is the wrong standard of review. Because the applicability of time limits provided in the Agreement is a procedural question, the Union contends, the district court must determine that the arbitrator acted in bad faith or was guilty of misconduct in order to vacate the award.

It is true that in cases where "procedural" decisions are reviewed, the Supreme Court has ruled that federal courts are empowered to set aside an arbitration award only when the arbitrator acted in bad faith or was guilty of misconduct. *United Paperworkers Intern. Union v. Misco*, 484 U.S. 29, 40, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987). But "procedural" decisions made in arbitration are different than those made in other contexts. As used in the arbitration setting, procedural decisions occur when the arbitrator is faced with an issue that is not clearly specified in the collective bargaining agreement *while resolving the merits of the dispute*. For example, the Supreme Court in *Misco* ruled that the arbitrator's decision to limit evidence

proffered to resolve the merits of a dispute was procedural and best left to the arbitrator. *Misco*, 484 U.S. at 39-40, 108 S.Ct. 364. This was because the evidentiary decision was in effect "a construction of what the contract required when deciding discharge cases." *Id.* at 39, 108 S.Ct. 364.

To make such a "procedural" decision, it must previously be determined that the matter at issue is subject to arbitration. In *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557-58, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964), the Supreme Court held that *"[o]nce it is determined . . . that the parties are obligated to submit the subject matter to arbitration*, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *Id.* (emphasis added); *see also Misco*, 484 U.S. at 39-40, 108 S.Ct. 364 (same).

Accordingly, the Union's reliance on the "procedural" standard of review set forth in *Misco* is misplaced. In *Misco*, the matter at issue was subject to arbitration, and – after finding that the matter was arbitrable – the Supreme Court reviewed the arbitrator's "procedural" decisions relating to the merits of the dispute. In the instant matter, the Company challenges whether the matter is arbitrable. The district court found that the Pollard dispute was not arbitrable and therefore never examined the arbitrator's "procedural" decisions. Thus, the standard of review set forth in *Misco* is not applicable to the instant matter.[2]

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[2] Moreover, it is important to note that while the Union characterizes the time deadline as "procedural," it is not truly

In sum, the district court applied the proper standard of review in vacating the Witney Award. Namely, the court examined whether the Pollard grievance was arbitrable by determining whether the Witney Award drew its essence from the Agreement. *See Interstate Brands*, 909 F.2d at 890-891 (rejecting Union's contention that an arbitrator's decision regarding arbitrability is reviewed under the *Misco* "affirmative misconduct" standard and holding that the proper standard of review requires the court to determine whether the decision draws its essence from the collective bargaining agreement).

II. Did the District Court Substitute its Interpretation of the Agreement for That of Arbitrator Witney?

The Supreme Court has made clear that courts must give an arbitrator's decision substantial deference because it is the arbitrator's construction of the collective bargaining agreement, not the court's construction, to which the parties have agreed. *See Misco*, 484 U.S. at 37-38, 108 S.Ct. 364. Indeed, an arbitrator's factual errors and even misinterpretation of a collective bargaining agreement are not subject to reconsideration by the court. *Id.* at 36, 108 S.Ct. 364. Accordingly, the arbitrator's decision will be upheld if it "draws its essence from the collective bargaining agreement," *see* Discussion Part I, *supra*, and is not merely the arbitrator's "own brand of

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so. The time limit set forth in the Agreement is not analogous to a statute of limitations. Rather, the time bar is explicitly set forth in the Agreement and presumably was a bargained-for provision. In this sense, the deadline for filing grievances is substantive, not procedural.

industrial judgment." *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).

An arbitrator, however, does not have unfettered discretion. An "arbitrator is confined to the interpretation and application of the collective bargaining agreement, and although he may construe ambiguous contract language, he is without authority to disregard or modify plain and unambiguous provisions." *Dobbs, Inc. v. Local 614, Int'l Brotherhood of Teamsters*, 813 F.2d 85, 86 (6th Cir.1987). When an arbitrator disregards the collective bargaining agreement and its terms or departs from arguably construing the contract, the court must vacate the award. The Sixth Circuit in *Dobbs* identified four ways in which an arbitrator may depart from the essence of the agreement:

> (1) an award conflicts with express terms of the agreement; (2) an award imposes additional requirements not expressly provided in the agreement; (3) an award is without rational support or cannot be rationally derived from the terms of the agreement, or (4) an award is based on general considerations of fairness and equity instead of the precise terms of the agreement.[3]

Dobbs, 813 F.2d at 86 (quoting *National Gypsum Co. v. United Steelworkers of Am.*, 793 F.2d 759, 766 (6th Cir.1986)). The requirements set forth in *Dobbs* also are reflected in part in the language of the Agreement:

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[3] Although the district court found that all four of the *Dobbs* factors were present in this case, only one is required to find that the arbitrator departed from the essence of the agreement.

> **Section 6.7** The function of the Arbitrator shall be of a judicial rather than of a legislative nature. The Arbitrator shall not have the authority to add to, ignore or modify any of the terms or provisions of the Agreement.

In the instant matter, the district court did not substitute its judgment for the judgment of the arbitrator. Rather, it applied the *Dobbs* factors and properly found that Arbitrator Witney's decision departed from the essence of the Agreement.

First, the district court held Witney's decision conflicted with the express terms of the Agreement. The July 1, 1996 letter, on which Witney relied to find the grievance arbitrable, is inconsequential to the determination of whether the Pollard grievance was timely filed. Although Witney decided that the letter clarified the Union's intention to arbitrate Pollard's grievance, the fact remains that *the notice was too late.*

Under the express terms of the Agreement, the grievance was required to be submitted within five working days of Pollard's termination on May 31, 1996. The failure to comply with such times limits "shall cause the grievance to be barred and considered completely disposed of from the standpoint of the Company, the Union and the Employee." Nowhere in the Agreement is there a provision allowing a grievant to circumvent the time deadline by letter of intent.

The July 1st letter – submitted over a month after Pollard's termination – clearly does not conform to this

requirement.[4] Indeed, Witney recognized that the letter itself did not meet the time limits set forth in the Agreement. But then, without a reasoned explanation, Witney concluded that the letter somehow cured the defect regarding time deadlines. Based on these undisputed facts, it is clear that the arbitrator's decision conflicts with the express terms of the Agreement, and thus fails to draw from the essence of the Agreement.[5]

Second, the district court correctly determined that the Witney Award imposes additional requirements not explicitly provided for in the Agreement. The award requires the Company to accommodate all written demands for arbitration. This contradicts the deadlines provided in the Agreement, not to mention Arbitrator Witney's own conclusion that the deadlines are mandatory, and imposes additional requirements on the Company.

Third, the district court accurately concluded that the Witney Award is not rationally derived from the terms of

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[4] Even if the ten-day deadline applied from Section 6.1 of the Agreement, the July 1, 1996 letter was too late.

[5] During oral argument, the Union contended that because the practice of commencing discharge cases at Step C rather than Step A was not explicitly written in the Agreement, the Arbitrator was interpreting ambiguous contract terms when he found the July 1st letter to be sufficient notice. Although, if true, this would require the district court to affirm Arbitrator Witney's Award, this is not what happened. Rather than finding any ambiguity, Arbitrator Witney explicitly determined that the time deadline for filing Pollard's grievance was not met, but nevertheless concluded that the letter "cured the defect." In other words, the arbitrator ignored the explicit time limit set forth in the Agreement.

the Agreement. Witney provided no support in the Agreement for finding the grievance arbitrable. He refers to no provision supporting his view that the July 1st letter cured the deadline problems. Rather, he merely concludes that the letter is "clear and unmistakable notice."

The language in the Agreement regarding written notice to the Company gives special weight to missing deadlines. A missed deadline creates a conclusive presumption that the Union accepts the Company's answer to the grievance. (*See* Section 6.1, Step D). Conclusive presumptions cannot be overcome by any amount of evidence to the contrary. Further, the Arbitrator's "cure" of the deadline is not rationally derived from the terms of Agreement. In fact, the letter and the effect the Arbitrator gave to it contradicts the clear terms of the Agreement. This, as the district court noted, is not a case of misinterpretation to which the court must defer. This is a case of no interpretation. Indeed, this is a case where the Arbitrator ignored the plain language of the Agreement.

Fourth, the district court appropriately found that the Witney Award was based on general considerations of fairness and equity instead of the precise terms of the Agreement. Although Arbitrator Witney avoided using the terms "fairness" and "equity" in his award, the district court concluded that these motivations must underlie the arbitrator's decision to ignore the Agreement's deadlines requirements. Here, the Arbitrator not only ignored the Agreement's deadlines, he did so while acknowledging that the Company did not waive the deadlines and had not been lax in enforcing them.

In sum, all of the four *Dobbs* factors were violated in this case. Thus, based on the undisputed facts, it is clear that Arbitrator Witney's decision departed from the essence of the Agreement and was properly vacated by the district court.

III. Did the District Court Err in Finding the Archer Award to be Moot?

The Union contends that the Archer Award, issued six months before the Witney Award, must be enforced because the Company allegedly ignored the decision. The Company, however, maintains that the Archer Award does not affect Pollard's discharge because Pollard still accumulated enough absences from work – not including the day at issue in the Archer Award – to be discharged under the Company's attendance policy.

After the district court vacated the Witney Award rendering Pollard's grievance barred from arbitration, the district court held that enforcement of the Archer Award would have no impact on the outcome of this case because the merits of Pollard's grievance would never be reached. On appeal, the Union argues that the issue is not moot because the Union is entitled to attorney's fees incurred from re-litigating the Archer Award during the Witney arbitration. But this argument does not relate to how or why the enforcement of the Archer Award would impact the outcome of this case. Thus, the district court properly determined that the Union's counterclaim to have the Archer Award enforced is moot.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:97CV-785-H

WYANDOT, INC. PLAINTIFF

V.

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 227 DEFENDANT

MEMORANDUM OPINION

The Court now considers parties' cross motions for summary judgment. Plaintiff, Wyandot, Inc., produces snack foods in Jeffersonville, Indiana. United Food and Commercial Workers Union, Local 227 (the "Union") represents approximately 210 bargaining unit employees, including Sue Pollard, at Wyandot, Inc. At all times concerning the events discussed here, the Company and Union were subject to *Articles of Agreement between United Food and Commercial Workers District Local 227 and Wyandot, Inc.* (the "CBA"). Pollard was discharged for violation of Wyandot's No-Fault Attendance Policy. Wyandot filed a complaint in this Court pursuant to § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 to vacate the subsequent arbitration award reinstating Pollard. The Union filed a counterclaim to enforce the arbitration award and to enforce an earlier arbitration award having some relevance to Pollard's attendance record.

1.

Wyandot terminated Pollard, effective May 30, 1996, by letter dated May 31, 1996. She was fully aware of her

discharge no later than June 1, 1996. On June 18, the Union submitted a written grievance to Wyandot. On June 20, Wyandot gave written notice to the Union that the grievance was not filed according to time deadlines in the CBA. On July 1, 1996, the Union notified Wyandot of its belief that Wyandot's response was unacceptable and that the Union intended to arbitrate Pollard's discharge grievance. The grievance was subsequently arbitrated before Dr. Fred Witney (the "Arbitrator"). At arbitration, Wyandot maintained that Pollard's grievance was not filed timely under the CBA. The Union countered that Pollard's discharge was not in accordance with the company's No-Fault Attendance Policy.

The Arbitrator acknowledged that neither the written grievance filed by the Union nor the Union's letter expressing its intent to arbitrate met any deadlines in the grievance procedures. The arbitrator, however, held the CBA deadlines inapplicable, thus finding the grievance arbitrable. As to the merits of the grievance, the Arbitrator found that three "occurrences" or absences on Pollard's attendance record should have been excused. Excused absences are not "occurrences" under the No-Fault Policy and are not subject to discipline.[1]

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[1] Pollard had fourteen "occurrences" on her attendance record. Under the No-Fault Policy, the eighth occurrence merits a "warning notice" from the Human Relations Department; the tenth "occurrence" merits a verbal reprimand; the twelfth occurrence merits a written reprimand; the thirteenth occurrence merits termination. The Arbitrator deemed one absence (January 8, 1996) excused by virtue of an earlier arbitration award that January 8 was a snow day for all employees absent on that day. Such snow days are excused. The

By excusing those three absences, the Arbitrator held Pollard was not subject to discharge under the company's No-Fault Attendance Policy. The Arbitrator awarded Pollard reinstatement and back pay. In response to the arbitration award, Wyandot filed a complaint with this Court to have the award vacated.

The Union's counterclaim seeks enforcement of the Witney Arbitration, and enforcement of an earlier arbitration award by Arbitrator Edward P. Archer ("Archer Award"). The Archer Award sustained the Union's grievance by deeming excused all January 7 and 8, 1996 absences because of snow.[2]

At issue here is Arbitrator Witney's finding that the grievance procedure's deadlines did not apply to Pollard's grievance.[3] The arbitrator made several findings of

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arbitrator deemed two other absences excused because they were related to appearances Pollard was to make before the Worker's Compensation Board.

[2] Pollard missed only January 8, 1996.

[3] The following CBA provisions were considered by Arbitrator Witney:

Article 6
GRIEVANCE PROCEDURE AND ARBITRATION

Section 6.1 Any disputes, complaints or grievances arising from alleged violations of this Agreement by the Company shall be settled and determined through the following procedure:

Step A: Any Employee and/or steward having a grievance will first attempt to adjust same by conference between the employee and/or steward involved and his or her area Manager.

undisputed fact that are important in this case. These include:

Step B: If a grievance is not settled in Step A of the grievance procedure, the employee will next attempt to adjust same with his or her steward and the Department Manager.

Step C: If a grievance is not settled in Step B of the grievance procedure, it shall be reduced to writing and the aggrieved employee, the Steward, and a Union Representative or officer of the Union (together with such associates as he/she may wish to assist him/her in the matter) and a designated representative of the Company (together with such associates as they may wish to assist them in the matter) shall then attempt to settle the grievance.

Step D: If the grievance has not been satisfactorily settled and if the grievance is otherwise arbitrable under this Agreement, it may be referred to arbitration in strict accordance with the provisions of this Agreement pertaining to arbitration, but not, otherwise, provided, however, that if the Union fails to notify the Company in writing by registered United States mail within ten (10) days after the Company procedure above, then the Union shall be conclusively presumed to have accepted the Company's answer thereto and said grievance shall not thereafter be arbitrable.

Section 6.2 Any disputes, complaints or grievances arising from alleged violations of this Agreement by the Company shall be deemed, considered and held to have been waived unless the same are presented for settlement and determination of Step (A) of the Grievance Procedure of this Agreement within five (5) working days from the date on which said dispute, complaint or grievance first arose. The Union shall have five (5) working days from the date on which the Company gives its answer at Step (A) to appeal a grievance from Step (A) to Step (B) of this

(1) Wyandot discharged Pollard effective May 30, 1996. The written grievance of her

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Grievance Procedure and likewise from Step (B) to Step (C) of this grievance Procedure.

* * *

Section 6.6

* * * All time limits for the processing of grievances, up to and including the actual appeal in writing to arbitration, shall be deemed mandatory requirements and the failure to comply with such specified time limits shall cause the grievance to be barred and considered completely disposed of from the standpoint of the Company, the Union and the employee or employees involved. However, it is understood that the parties, through mutual agreement, may extend or waive the time limits of any of the above-mentioned steps of the grievance procedure.

Section 6.7 The function of the Arbitrator shall be of a judicial rather than a legislative nature. The Arbitrator shall not have the authority to add to, ignore or modify any of the terms or provisions of the agreement. The Arbitrator shall never in any degree or to any extent substitute his judgment for the Company's judgment, and where matters of judgment are involved (if the case is otherwise arbitrable under this Agreement) he shall be limited to deciding whether or not the Company acted capriciously or in bad faith. The Arbitrator shall not decide issues which are not directly involved in the case submitted to him, and no decision of the Arbitrator shall require the payment of a wage rate different from, or the payment of any wages in addition to, those expressly set forth in this Agreement. Subject to the foregoing qualifications and limitations, the Arbitrator's award shall be final and binding upon the Company and the Union and the aggrieved employee or employees.

discharge was filed June 18, 1996. Wyandot argued that Section 6.2 deadlines applied to Pollard's grievance.

(2) Section 6.1, Step D deadlines contradict Section 6.2 deadlines. Specifically, under section 6.2, a grievant has five (5) *working days* from the date the Company gives its answer to a dispute, complaint, or grievance to grieve according to the procedures. Under 6.1 Step D, the Union has 10 *days* to notify the Company by registered mail of its intent to arbitrate. "In any event, Section 6 tells us that all time limits are mandatory requirements and the 'failure to comply with such specified time limits shall cause the grievance to be barred and considered completely disposed of from the standpoint of the Company.' " Witney Award, p. 12.

Plaintiff challenges the Arbitrator's conclusions regarding the arbitrability of the grievance. The Court believes it is useful to quote the challenged analysis here:

"To be sure about it, the Arbitrator fully understands the position of the Company. Scores of decisions demonstrate that enforcement of time limits has frequently been upheld by many arbitrators. Indeed, the published and

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Section 6.8. If the Union fails, refuses, or declines to prosecute a grievance on behalf of an Employee, or if the Company and the Union settle any grievance on behalf of an Employee hereunder, the Employee who has filed such grievance or on whose behalf it has been filed shall be conclusively bound thereby and the Union shall thereafter be estopped to revive or further prosecute said grievance. (Emphasis added).

unpublished cases of the instant Arbitrator are proof positive of his understanding that time limits hold a venerable place in the arbitration process.

Not for the Union's letter to Wyandot of July 1, 1996, the Arbitrator would have denied Pollard's grievance upholding her termination.

Given that letter, it would be improper to sustain her discharge on the basis of time limits. It states:

> This letter is in regards to the grievance filed under Sue Pollard. The company's final position in this matter was unacceptable to the Union. Therefore, this grievance *IS NOT SETTLED.* Please be advised that Local 227 is submitting this grievance to arbitration. The issue for arbitration and expected remedy is:
>
> Our member, Sue Pollard, was wrongfully discharged for attendance. We are asking that our member return to work with full back pay and benefits.
>
> We will be requesting a panel of arbitrators in the near future. However, this letter is the Union's final notice of its intent to arbitrate this grievance. (Emphasis in original) (Joint Exhibit 5).

This is clear and unmistakable notice to Wyandot that the Union intended to arbitrate the Pollard grievance. If words do not mean what they plainly say, the Union without any doubt about it informed the Company of its clear and certain intent to present the Pollard grievance to impartial arbitration.

> In an otherwise skilled and comprehensive brief, the Company did not advise the Arbitrator how to handle the above cited letter. Apparently Wyandot suggests that the Arbitrator should simply ignore it. To ignore evidence that stands as the central core of the Union's time limits case would be improper. Indeed the letter overcomes whatever defect it has in terms of time limits.
>
> We recognize, of course, that the above cited letter does not meet the time limits requirement: five (5) or ten (10) days, as incorporated in Section 6(2) and Section 6(1) Step D. In the Arbitrator's judgment, however, the letter overcomes whatever time limits defect it may contain.
>
> In short, given the totality of the record, we find that Pollard's grievance was submitted in a timely manner."

Witney Award, 13-14. Following this explanation, the Arbitrator moved to the merits of Pollard's grievance and granted her the relief requested.

II.

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law. Fed. R.Civ.Pro. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A dispute is genuine when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The issue is whether the evidence submitted presents a sufficient disagreement about the material facts so

that submission to a jury is necessary, or whether the evidence is so one-aided that a party must prevail as a matter of law. *Id.* at 251-52. In the face of a properly supported motion for summary judgment, the nonmoving party cannot merely rest on its pleadings, but must come forward with probative evidence to support its claim. *White v. Turfway Park Racing Ass'n, Inc.*, 909 F.2d 941 (6th Cir. 1990). The respondent cannot simply rely on the hope that the trier of fact will disbelieve the movant's denial of the disputed fact. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989). The respondent must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 474 U.S. 574, 586 (1986).

The courts have only extremely limited authority to review arbitration awards. An arbitrator's factual errors and even misinterpretation of a collective bargaining agreement are not subject to reconsideration by the Court. *United Paperworkers Int'l Union, AFL-CIO v. Misco*, 484 U.S. 29, 36 (1987). " 'The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards.' " *Id.* (quoting *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960)). If an "arbitrator's award 'draws its essence from the collective bargaining agreement,' and is not merely [the arbitrator's] own brand of industrial justice.' " the Court must uphold the award. *Id.* at 36-37, quoting *Enterprise Wheel*, 363 U.S. at 597. Thus, the " 'arbitrator is confined to the

interpretation and application of the collective bargaining agreement, and although he may construe the collective bargaining agreement, and although he may construe ambiguous contract language, he is without authority to disregard or modify plain and unambiguous provisions,' " *Dobbs Inc. v. Local 614, Int'l Brotherhood of Teamsters, Chauffeurs Warehousemen & Helpers of America,* 813 F.2d 85, 86 (6th Cir. 1987) (quoting *Detroit Coil v. Int'l Ass'n of Machinists & Aerospace Workers, Lodge No. 82,* 594 F.2d 575, 579 (6th Cir. 1979).

The Sixth Circuit in *Dobbs* listed four ways that an arbitrator may depart from the essence of the collective bargaining agreement and subject the award to vacation by the Court. An arbitration award departs from the essence of the agreement if:

> "(1) an award conflicts with express terms of the collective bargaining agreement, (2) an award imposes additional requirements that are not expressly provided in the agreement, (3) an award is without rational support or cannot be rationally derived from the terms of the agreement, and (4) an award is based on general considerations of fairness and equity instead of the precise terms of the agreement."

Dobbs, 813 F.2d at 86 (quoting *Cement Divisions, Nat'l Gypsum Co. v. United Steelworkers of America,* 793 F.2d 759, 766 (6th Cir. 1986). These requirements in law are in part reflected in the language of the CBA, which states:

> Section 6.7 The function of the Arbitrator shall be of a judicial rather than a legislative nature. The Arbitrator shall not have the authority to add to, ignore or modify any of the terms or provisions of the Agreement."

The question the Court must answer is whether Arbitrator Witney's decision departs from "the essence of the collective bargaining agreement."

III.

It is clear from the excerpted portion of the Arbitrator's award that the timeliness question turned on the July 1, 1996 letter from the Union to Wyondot [sic] of the Union's intent to arbitrate the Pollard grievance. Defendant says that the letter clarified its intent to arbitrate Pollard's grievance (Memorandum in Opposition pgs. 10-11). While that may be so, the Union argues an immaterial issue. The argument seems to miss the point that the notice was too late. Specifically, Witney acknowledged that but for the letter, the deadline requirement would end the arbitration. Witney concluded, however, that the letter cured any defect regarding deadlines. The Court cannot understand how this could possibly be so. The letter says nothing about the deadline for filing a notice of intent to arbitrate. The court has looked at the letter in every way to find how it might be construed to extend or void the otherwise applicable filing requirements. It is a complete mystery how this letter might be so construed. All other issues are irrelevant except for this question. No one, in particular the Arbitrator, has provided any explanation to this crucial question.

The result is the same when one analyzes the Arbitrator's decision in accordance with the *Dobbs* criteria. Under *Dobbs*, the first question is whether the award "conflicts with express terms of the collective bargaining agreement." Whitney acknowledged that the July 1 letter

did not meet any deadline and that somehow the letter's contents cured timeliness defects. Nowhere in the CBA is there a provision for circumventing the deadline by letter of intent.

The next question is whether the award "imposes additional requirements that are not expressly provided in the agreement." The award requires the company to accommodate all written demands for arbitration. This is completely contrary to the deadlines expressed in the CBA not to mention the Arbitrator's own conclusion that all deadlines are mandatory.

The next *Dobbs* question is whether the award "is without rational support or cannot be rationally derived from the terms of the agreement." The Arbitrator gave no support in the CBA for finding the grievance arbitrable. He refers to no provision for the conclusion that the July 1 letter cured any deadline problems. He merely states that the letter "is clear and unmistakable notice to Wyandot that the Union intended to arbitrate the Pollard grievance." The language in CBA regarding written notice to the Company about arbitration gives special weight to missing deadlines. Missing the deadline creates a *conclusive presumption* that the Union accepts the Company's answer to the grievance. *See* Section 6.1, Step D. Conclusive resumptions cannot be overcome by any amount of evidence to the contrary. Thus, the Arbitrator's "cure" of the deadline cannot be rationally derived from the terms of the agreement. The letter and the effect the Arbitrator gave to it is totally contrary to the clear terms of the CBA. This is to a case of misinterpretation to which the court must defer. This is a case of no interpretation. This is an

instance where the Arbitrator has ignored the language of the CBA.

Finally, the Court must ask whether the award "is based on general considerations of fairness and equity instead of the precise terms of the agreement." Although the Arbitrator avoids using the terms "fairness" and "equity" in his award, the Court must conclude that these motivations underlie his decision to ignore the CBA's deadline requirements.

While the Arbitrator's analysis of the merits of Pollard's grievance seem sound, his consideration of the timeliness of her complaint was not. No amount of harshness or unfairness can overcome the terms of the CBA. *See Sears, Roebuck and Co. v. Teamsters Local Union No. 243,* 683 F.2d 154, 155 (6th Cir. 1982) (court affirmed decision vacating arbitration award, thereby reinstating layoff of ninety employees "even though result in . . . case is harsh"). The Union failed to timely grieve Pollard's discharge and arguably failed to represent Pollard's interest regarding any prior discipline under the No-Fault Policy. That the Policy is "no-fault" does not absolve the Union or Pollard of taking responsibility for her status before discharge or any questionable "occurrences" on her record.

The Arbitrator not only ignores the CBA's deadlines, he does so while acknowledging the company did not waive the deadlines, and had not been lax in enforcing the grievance procedure deadlines. Furthermore, there was evidence in the record that the Union was fully aware that the deadlines applied to discharge grievance procedures even though the parties had altered those

procedures to begin at Section 6.1 Step C instead of Step A.[4]

IV.

Because the standard for vacating an arbitration is so narrow, the court feels obligated to address each of the Union's arguments.

First, the Union advocates that arbitrators' awards on procedural questions are subject to an even narrower standard of review than substantive decisions by arbitrators. To support this, the Union quotes *Interstate Brands Corp. v. Chauffeurs, Teamsters, Warehousemen & Helpers Local 135*, 909 F.2d 885, 889 (6th Cir. 1990): "On questions of procedural arbitrability, 'a court's role is even more sharply circumscribed . . . [P]rocedural questions which

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[4] The parties mutually agreed to alter the grievance procedure in discharge cases by starting at Step C of Section 6.1 instead of Step A. Nothing in the record indicates that in agreeing to start discharge grievances at a different step in the process, they also agreed to waive procedural deadlines, as the Union would have the Court believe. At a meeting about other grievances on June 14, 1996 to which Pollard showed up unexpectedly, the Union representative asked for the deadlines to be waived regarding Pollard and Wyandot refused to waive them. Had the agreed-upon, standard practice in discharge grievances been to waive the deadline, Pollard's presence at the meeting would not likely have been "unexpected" and more pointedly, the Union would not have felt the need to request a waiver of deadlines at that June 14th meeting. *See* Witney Award, 10. Moreover, the Arbitrator acknowledged that the Union did not refute testimony at arbitration that the company "has refused to hear numerous grievances in the past because time limits were not followed," Witney Award, 11.

grow out of the dispute and bear on its final disposition are the exclusive province of the arbitrator.' " Union's Memorandum in Opposition, 6-7. However, that isolated quotation seems to this court to give a misleading impression of the case. Ultimately the court found that procedural decisions regarding arbitrability are subject to the same standard of review as substantive decisions on the merits. That is, the procedural decisions must also draw their essence from the CBA. *Interstate Brands*, 909 F.2d at 890.

Second, in response to Wyandot's assertions that the Arbitrator Witney failed to base his decision on the CBA, the Union states that

> Wyandot fails to advise this Court [of] Arbitrator Witney's clear statement that his decision was based on his interpretation of the CBA. In this regard Arbitrator Witney wrote: "Nor does the Arbitrator violate the parameters of his authority as established by Section 6.7 of the Labor Agreement. In no way has he ignored, added to, or modified any terms or provisions of the contract."

Union's Memorandum in Opposition, at 9. The Union's statement, however, takes the Arbitrator's conclusion that he abided by the CBA out of context. The Arbitrator at the quoted portion of his award was defending his decision on the *merits* of Pollard's grievance. He was not defending his decision on the timeliness question. The Union further asserts that a "careful reading" of the award indicates that what Arbitrator Witney did was reconcile the conflicting deadlines of Section 6.1 and Section 6.2 of the CBA. The Court has carefully reviewed the

Arbitrator's words and finds that he did not adopt one provision over the other. The Arbitrator made no effort to reconcile the conflicting deadlines, probably because to do so would not change the result. He did acknowledge the different deadlines. He also seems to acknowledge that regardless of which one applied, neither the original grievance in this case nor the letter noticing the Union's intent to arbitrate met either deadline. This does not reconcile the provisions. The Arbitrator relies entirely on the July 1 letter.

Finally, the Union returns to *Interstate Brands* again, arguing that it was "nearly identical" to this case. Again, the Court respectfully disagrees. It is true that *Interstate Brands* addressed a timeliness question. In that case, however, the arbitrator construed and interpreted actual words in the grievance procedure's deadline provisions. Specifically, the word "occurrence" required some definition by the arbitrator. *Interstate Brands*, 909 F.2d at 891.[5] In our case no words required definition and the arbitrator defined none. In fact, in *Interstate Brands*, the arbitrator needed to construe the CBA. The nature of the grieved discipline required it. Because no such interpretation was necessary in our case, it differs significantly from *Interstate Brands*.

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[5] The grievant in *Interstate Brands* was on an extended suspension, pending outcome of criminal proceedings. The arbitrator found such an open-ended suspension a "continuing act" which could be grieved at anytime. *Id.* at 887. There was no discrete end to the "occurrence" at which the grievance limitation period could begin running.

V.

To paraphrase the Union, simply because the Union and Witney assert that the Witney Award draws its essence from the contract, does not necessarily make it so. *See* Union Memorandum in Opposition, 9. The Arbitrator's finding that Pollard's grievance and the July 1, 1996 letter were timely fails to draw its essence from the CBA. Furthermore, the Arbitrator ignored the terms of the CBA in finding the grievance arbitrable. Thus, Arbitrator Witney's award will be vacated. The Union's counterclaim to enforce the Witney award will be dismissed. Enforcement of the Archer award would not change this result. As a result of vacating the Witney award, the merits of Pollard's grievance and the specific enforcement of the Archer award are no longer material to this case.[6] Thus, the Union's counterclaim to have the Archer award enforced is now moot.

The Court is very reluctant to overturn an arbitrator's award. It is right that they be treated with extreme deference in order to maintain the proper working of the system without the feeling that the courts may give one side an advantage. However, the Court cannot escape the conclusion that the arbitrator here has completely

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[6] Enforcement of the Archer Award with regard to Pollard alone would not have prevented her dismissal. At the time of her discharge, she had fourteen occurrences on her attendance record when only thirteen are necessary to result in termination. Thus, enforcing the Archer Award would have no substantive effect on Pollard. It would only help her if the Witney award were to be upheld. Presumably, the Archer award will still have effect in every other applicable circumstance.

ignored the applicable deadlines without giving any reasons and without any reasons being apparent. Thus, this unusual order vacating the Arbitrator's award seems appropriate. The court will enter an order consistent with this Memorandum Opinion.

/s/ John G. Heyburn II
JOHN G. HEYBURN II
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:97CV-785-H

WYANDOT, INC. PLAINTIFF

V.

UNITED FOOD AND
COMMERCIAL WORKERS
UNION, LOCAL 227 DEFENDANT

ORDER

The Court having considered Plaintiff's motion for summary judgment and being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Plaintiff's motion for summary judgment is SUSTAINED and the arbitration award of Dr. Fred Witney is vacated and is unenforceable.

IT IS FURTHER ORDERED THAT Defendant's counterclaim to have the Arbitration Award of Dr. Fred Witney enforced is DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that Defendant's counterclaim to have the Arbitration Award of Edward P. Archer enforced as to Pollard is moot.

This is a final and appealable order.

This 3rd of December, 1998.

/s/ John G. Heyburn II
JOHN G. HEYBURN II
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

AWARD OF ARBITRATOR

In the Arbitration Between:
Wyandot, Inc.
Jeffersonville, Indiana

and

United Food and Commercial Workers Union
Local 227

After carefully considering the evidence, including the relevant provisions of the Labor Agreement and the Parties' arguments, the Arbitrator in his best judgment makes the following Award:

1. Under the circumstances of this case Grievance No. 5316, dated June 18, 1996, is granted on grounds that the Union notified the Company of its intention to arbitrate Sue Pollard's grievance in a timely manner, and further the Company improperly terminated Pollard under its No-Fault Attendance Policy, and further it discharged her without just cause under Article 8 of the Labor Agreement.

2. Given these findings, the Company is directed to reinstate Pollard in her job within two (2) working days after receipt of this Award and to award her compensation for all wages and other contract benefits she lost during her wrongful discharge.

October 20, 1997
(Date)

/s/ Fred Witney
Fred Witney, Arbitrator

INTRODUCTION

Parties in this case are Wyandot, Inc., Jeffersonville, Indiana and United Food and Commercial Workers Union, Local 227, called respectively the Company or Employer and the Union or Local 227. It arises under a Labor Agreement dated February 20, 1995 which is scheduled to expire February 15, 1998. Wyandot produces snack foods and employs about 210 bargaining unit members.

The case concerns the discharge of Sue Pollard effective May 30, 1996. According to the Company she was terminated because her grievance was not submitted in a timely manner and on the grounds that she violated the terms of the No-Fault Attendance Policy.

John Holzapfel, Human Resources Manager, wrote the letters which effected Pollard's discharge. On May 31, 1996, he wrote the Grievant:

> This letter is to notify you that your employment with Wyandot, Inc. is terminated effective 5/30/96. You have accumulated 13 occurrences during a 12 month period. According to our attendance policy, this requires Wyandot to terminate your employment.
>
> Best of luck to you in your future endeavors. (Joint Exhibit 2)

On June 20, 1996, he wrote the letter which claimed that Pollard's grievance was not filed in a timely manner. It stated:

> Grievance 5316, pertaining to Sue Pollard (termination), was not submitted in a timely manner, therefore, grievance is denied. Sue was

terminated on 5/31/96. Grievance was not submitted to company until 6/18/96. (Joint Exhibit 4)

Holzapfel testified concerning the time limits issue:

Neither Pollard nor the Union filed a timely grievance. It was not filed until June 18, 1996.

Subsequently, on June 18, 1996, the Union filed Grievance 5316 on behalf of Pollard. (Joint Exhibit 3) It states:

Sue was terminated for occurrences under the Attendance Policy. She wants her job returned to her in full.

It was signed by Ben Campbell, Chief Steward.

Failing to settle the grievance, the Parties elected to arbitrate the issues. Using the facilities of the Federal Mediation and Conciliation Service, Dr. Fred Witney conducted the hearing on June 11, 1997 at which time David B. Sandler, Esq. appeared for the Company and Jonathan D. Karmel, Esq. represented the Union. It was held at the Executive Inn, Louisville, Kentucky.

LABOR AGREEMENT

Article 2. Purpose

The Union agrees that it will cooperate with the Company and support its efforts to assure a full day's work on the part of Employees and that it will actively combat absenteeism and any other practices which hurt or interfere with production or the efficient operation and management of the Company's business. It further agrees that

it will support the Company in its efforts to operate and manage the business covered by this Agreement as efficiently and economically as possible, improve production and maintenance, preserve equipment, prevent accidents and strengthen good will between the Company and its Employees, as well as with its suppliers and customers.

Article 3. Management Prerogatives

The operation, control, and management of the plant, warehouse, and all activities of the Company in connection therewith which are covered or affected by this agreement and the supervision and direction of the working forces in said business are and shall continue to be solely and exclusively the functions and prerogatives of the management of the Company. All of the rights, functions, and prerogatives of management which are not expressly and specifically restricted or modified by one or more explicit provisions of this Agreement are reserved and retained exclusively to the Company. In no event shall any right, function, or prerogative of management ever be deemed or construed to have been modified, diminished or impaired by any past practice or course of conduct or otherwise than by an explicit provision of this Agreement. Specifically, but without in any manner limiting or affecting the generality of the foregoing, it is distinctly understood and agreed that this Agreement does not affect and shall never be deemed or construed to impair or limit in any way the Company's right in its sole discretion and judgment to determine . . . the size and composition of the working force covered by

this Agreement, the assignment of work, and policies affecting the selection of Employees; establish and enforce quality and service standards for its products and services . . . The Company shall also have the right from time to time in its sole discretion and judgment to make and enforce such reasonable new rules applicable to employees covered by this Agreement and to enforce, change, abolish or modify existing rules applicable to Employees covered by this Agreement as it may from time to time deem necessary or advisable, unless expressly prohibited from so doing by some explicit provision of this Agreement.

Article 6. Grievance Procedure and Arbitration

Section 6.1 Any disputes, complaints or grievances arriving from alleged violations of this Agreement by the Company shall be settled and determined through the following procedure:

Step A: Any Employee and/or steward having a grievance will first attempt to adjust same by conference between the Employee and/or steward involved and his or her Area Manager.

Step B: If a grievance is not settled in Step A of the grievance procedure, the Employee will next attempt to adjust same with his or her steward and the Department Manager.

Step C: If a grievance is not settled in Step B of the grievance procedure, then it shall be reduced to writing and the aggrieved Employee, the Steward, and a Union Representative or officer of

the Union (together with such associates as he/she may wish to assist him/her in the matter) and a designated representative of the Company (together with such associates as they may wish to assist them in the matter) shall then attempt to settle the grievance.

Step D. If the grievance has not been satisfactorily settled and if the grievance is otherwise arbitrable under this Agreement, it may be referred to arbitration . . . If the Union fails to notify the Company in writing by registered United States mail within ten (10) days after the Company gives its answer to a grievance at Step C of the grievance procedure above, then the Union shall be conclusively presumed to have accepted the Company's answer thereto and said grievance shall not thereafter be arbitrable.

Section 6.2 Any disputes, complaints, or grievances arising form alleged violations of this Agreement by the Company shall be deemed, considered and held to have been waived unless the same are presented for settlement and determination of Step (A) of the Grievance Procedure of this Agreement within five (5) working days from the date on which said dispute, complaint, or grievance first arose. The Union shall have five (5) working days from the date on which the Company gives its answer at Step (A) to appeal a grievance from Step (A) to Step (B) of this Grievance Procedure and likewise from Step (B) to Step (C) of this Grievance Procedure.

Section 6.6 All time limits for the processing of grievances, up to and including the actual appeal in writing to arbitration, shall be deemed mandatory requirements and the failure to comply with such specified time limits shall cause the grievance to be barred and considered completely disposed of from the standpoint of the Company, the Union and the Employee or Employees involved. However, it is understood that the parties, through mutual agreement, may extend or waive the time limits of any of the above-mentioned steps of the grievance procedure.

Section 6.7 The function of the Arbitrator shall be of a judicial rather than a legislative nature. The Arbitrator shall not have the authority to add to, ignore or modify any of the terms or provisions of the Agreement. The Arbitrator shall never in any degree or to any extent substitute his judgment for the Company's judgment, and where matters of judgment are involved (if the case is otherwise arbitrable under this Agreement) he shall be limited to deciding whether or not the Company acted capriciously or in bad faith. The Arbitrator shall not decide issues which are not directly involved in the case submitted to him, and no decision of the Arbitrator shall require the payment of a wage rate different from, or the payment of any wages in addition to, those expressly set forth in this Agreement. Subject to the foregoing qualifications and limitations, the Arbitrator's award shall be final and binding upon the Company and the Union and the aggrieved Employee or Employees.

Article 8. Discipline and Discharge

The Company shall have the right to discipline or discharge Employees for just cause.

ISSUES

1. Was Grievance 5316 filed in a timely manner in accordance with Article 6 of the Labor Agreement? If not, the grievance shall be denied. If so, the question is this:

2. Was Grievant Sue Pollard discharged for just cause in accordance with the contract's No-Fault Attendance Policy?

POSITIONS OF THE PARTIES

Whereas the Company claims the grievance should be denied, the Union asserts it should be granted. To enhance their positions both Parties filed post-hearing briefs.

Employer Arguments

The Employer respectfully submits that, regardless of all the excuses provided by Grievant for having exceeded the maximum allowable occurrences under the Attendance Policy, her grievance is not arbitrable. It is indisputable that the grievance was never put in writing until 18 days after the Chief Union Steward became aware of Grievant's termination, and 17 days after Grievant herself became aware of her termination. The Chief Steward conceded he filed most of the grievances at the plant. There is no reason he couldn't have filed this one, and the same goes for the Grievant herself.

The Employer urges that the only way for the Arbitrator to reach a decision on the merits in this case would be to ignore the plain language of the Agreement, a situation prohibited by the language of the Agreement itself. However, even if the Employer had not raised the issue of arbitrability at any time during the grievance procedure, it has demonstrated overwhelmingly that each and every one of Grievant's 14 occurrences were legitimately charged and, indeed, Grievant's termination must still be upheld even if one full occurrence were deleted from her record, still leaving her with 13 occurrences in a 12-month period under the Attendance Policy.

The Agreement prohibits the Arbitrator from "substitut[ing] his judgment for the Company's judgment" unless he finds that the Company "acted capriciously or in bad faith." [Section 6.7].

For all the foregoing reasons and authorities, the Employer respectfully requests that the grievance be denied in its entirety.

Union Arguments

Wyandot, however, claims that although it may have advance notice of am [sic] employee's absence due to a court date, it is the employee's further obligation to arrange for their replacement. Local 227 submits that this argument should be rejected. It is unreasonable to impose an obligation on an employee that is unwritten or otherwise uncommunicated to employees. How can an employee be expected to meet their obligations when they are unaware of them? They cannot! Thus, while it is reasonable for Wyandot to require advance notice of an

employee's absence for a court date, it is unreasonable to require the employees to arrange for their replacement when they were unaware of this obligation. Moreover, it is the employer's responsibility to schedule employees for work. In short, these occurrences should be excused.

Finally, the May 30 court date was necessary only because Wyandot's attorney, Angermeier, canceled the February 1 court date without prior notice. Thus, had Wyandot not canceled the February 1 court date, the May 30 court date would have been unnecessary. Stated another way, by cancelling the February 1 court date without prior notice, Wyandot caused Pollard two occurrences, both of which should be excused.

In summary, it is the Union's position that three of Pollard's occurrences should not be counted, thereby reducing the number of occurrences to less than 13. Accordingly, Pollard's termination under Wyandot's no-fault attendant (*sic*) policy was improper.

For all the reasons argued above, United Food and Commercial Workers Union Local 227 respectfully requests that the arbitrator sustain the grievance and order Wyandot, Inc. to reinstate the Grievant, Sue Pollard, to her former job, together with back pay and other Contract benefits she did not receive due to her improper discharge.

To the extent necessary and appropriate, additional arguments of the Parties will be cited in the following portion of the decision.

EVALUATION OF THE EVIDENCE

Issue of Timeliness

There are two (2) provisions in the Labor agreement which are related to the time limits issue. Article 6, Section 6.1, Step D states:

> . . . If the Union fails to notify the Company in writing by Registered United States mail within ten (10) days after the Company gives its answer in writing to a grievance at Step C of the Grievance Procedure above, then the Union shall be conclusively presumed to have accepted the Company's answer thereto and said grievance shall not thereafter be arbitrable.

Section 6.2 provides:

> Any disputes, complaints or grievances arising from alleged violations of this Agreement by the Company shall be deemed, considered and held to have been waived unless the same are presented for settlement and determination of Step (A) of the Grievance Procedure of this Agreement within five (5) working days from the date on which said dispute, complaint or grievance first arose.*

It is undisputed that the Company discharged Pollard effective May 30, 1996. Likewise the written grievance protesting her discharge was not filed until June 18, 1996. To support its position that the grievance was not timely, the Company cited several arbitration cases as

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* The Parties agreed that discharge grievances shall proceed directly to Step C of the Grievance Procedure. Holzapfel testified that this practice has been in effect for at least two (2) years.

precedent, including the instant Arbitrator's decision in *St. Joe Container*, 95 LA 987 (1996).

In the Union's judgment, the Company claims that the grievance was not timely filed because Hernandez did not receive a copy of the Pollard termination letter, arguing:

> . . . Wyandot is barred from arguing that the grievance is untimely since it is undisputed that Hernandez never received by mail a copy of Pollard's discharge letter as is required by Article 8 of the Contract. Rather, Hernandez's copy of Pollard's discharge notice was placed in Campbell's plant mail box, and was not discovered there until after Campbell returned from his vacation. (U. Ex. 4) Therefore, Hernandez could not have timely complied with Holzapfel's modified grievance procedure even if he wanted to because he was never timely notified of Pollard's termination by Wyandot. (Union Post-Hearing Brief, p. 7)

To the contrary, Joint Exhibit 2 lists Hernandez as receiving a copy of Pollard's termination letter.

Understandably Wyandot with vigor relies on Article 6.2 to demonstrate that the grievance was not filed in a timely manner, arguing:

> . . . Article 6.2 states clearly that "Any disputes, complaints, or grievances arising from alleged violations of this Agreement by the Company shall be deemed, considered and held to have been waived unless the same are presented for settlement and determination of Step (A) of the grievance procedure of this Agreement within five (5) working days from the date on which

> said dispute, complaint, or grievance first arose." Since, in a discharge situation, the parties commence the grievance procedure at Step C instead of Step A, the Grievant was required to "present[ ] for settlement and determination" the grievance within five working days of receiving notification that she had been discharged. (Company Post-Hearing Brief, p. 7)

And:

> Holzapfel testified that a meeting was scheduled for June 14, 1996 to discuss two other grievances, those of Bob Goodin and Marcus Smith. Alex Hernandez, the Union's business representative, and Ben Campbell, the Chief Union Steward, represented the Union at that meeting. The Grievant in this case, Sue Pollard, also showed up at that meeting. Although Holzapfel was surprised to see Pollard, he agreed to listen to what the Union had to say, although he made it clear that the Company had not agreed to waive time limits for her grievance. Indeed, Hernandez asked Holzapfel during that meeting to consider waiving the time limits, but Holzapfel would not agree. [Company Exhibit 1]. At that meeting, the Company *still* had never been presented with a written grievance regarding Pollard's termination, 13 days after Pollard signed for her letter. (Emphasis in original)
>
> The Union ultimately filed a written grievance on Pollard's behalf on June 18, 17 days after Pollard received her termination letter, and 18 days after Chief Steward Campbell read the termination letter. (*Ibid.*, p. 8)

In addition, referring to Holzapfal's testimony, not refuted by the Union, he has refused to hear numerous grievances in the past because time limits were not followed. There is no showing in the record that Wyandot has been lax in the enforcement of time limits. Likewise, no testimony was offered by either side to show that time limits were either waived or extended in this case.

In conclusion, the Company asserts:

> The bottom line is this: neither the Grievant, Chief Steward Ben Campbell or assistant Steward Marcus Smith filed a written grievance, not to mention business representative Alex Hernandez, until 18 days after the Union was put on notice that Pollard had been terminated, almost two weeks beyond the time limits expressly agreed upon by the parties to the labor contract. All the excuses in the world don't serve as an adequate substitute for what the collective bargaining agreement requires – a grievance "reduced to writing" at Step C of the grievance procedure and presented to the Company "within five (5) working days from the date on which said dispute, complaint, or grievance first arose. The Union had notice that Grievant was terminated as of May 31 (*sic*), and Grievant herself knew of her termination of June 1, yet the written grievance wasn't presented to the Employer until June 18, well beyond the limitations period.
> (Company Post-Hearing Brief, p. 17)

Section 6.1 Step D and Section 6.2

Some contradictions exist between Section 6.1 Step D and Section 6.2. Under the former, the Union has *ten (10)*

days to notify the Company in writing after Wyandot gives its answer in writing to a grievance at Step C of the Grievance Procedure. If not, the Union shall be conclusively presumed to have accepted the Company's answer and said grievance shall not be arbitrable.

Under the latter, section 6.2, the Union has *five (5) working days* from the date on which the Company gives its answer to a dispute, complaint, or grievance. If not, it shall be deemed the grievance has been waived.

United States Registered Mail

True, the Union letter in question was not sent Registered United States Mail as required by Section 6.1 Step 2. Registered mail serves a useful purpose when an employer, here Wyandot, questions whether it received a letter from a union. In the case at hand, the Company does not say it did not receive the letter in question. Indeed it was submitted as *Joint Exhibit 5*, eliminating any doubt of its receipt by Wyandot or to its authenticity.

In any event, Section 6 tells us that all time limits are mandatory requirements and the "failure to comply with such specified time limits shall cause the grievance to be barred and considered completely disposed of from the standpoint of the Company."

As said, Wyandot discharged Pollard effective May 30, 1996. Accordingly, she or the Union had five (5) days (Section 6.2) or ten (10) days (Section 6.1) Step D to file the grievance. Since it was not submitted until May 18, 1996, the Company asserts the grievance was not timely and thus not arbitrable.

Letter of July 1, 1996

To be sure about it, the Arbitrator fully understands the position of the Company. Scores of decisions demonstrate that enforcement of time limits has frequently been upheld by many arbitrators. Indeed, the published and unpublished cases of the instant Arbitrator are proof positive of his understanding that time limits hold a venerable place in the arbitration process.

Not for the Union's letter to Wyandot of July 1, 1996, the Arbitrator would have denied Pollard's grievance upholding her termination.

Given that letter, it would be improper to sustain her discharge on the basis of time limits. It states:

> This letter is in regards to the grievance filed under Sue Pollard. The Company's final position to this matter was unacceptable to the Union. Therefore, this grievance *IS NOT SETTLED*. Please be advised that Local 227 is submitting this grievance to arbitration. The issue for arbitration and expected remedy is:
>
> Our member, Sue Pollard, was wrongfully discharged for attendance. We are asking that our member return to work with full back pay and benefits.
>
> We will be requesting a panel of arbitrators in the near future. However, this letter is the Union's final notice of its intent to arbitrate this grievance. (Emphasis in original) (Joint Exhibit 5)

This is clear and unmistakable notice to Wyandot that the Union intended to arbitrate the Pollard grievance. If words do not mean what they plainly say, the

Union without any doubt about it informed the Company of its clear and certain intent to present the Pollard grievance to impartial arbitration.

In an otherwise skilled and comprehensive brief, the Company did not advise the Arbitrator how to handle the above cited letter. Apparently Wyandot suggests that the Arbitrator should simply ignore it. To ignore evidence that stands as the central core of the Union's time limits case would be improper. Indeed the letter overcomes whatever defect it has in terms of time limits.

We recognize, of course, that the above cited letter does not meet the time limits requirement; five (5) or ten (10) days, as incorporated in Section 6(2) and Section 6(1) Step D. In the Arbitrator's judgment, however, the letter overcomes whatever time limits defect it may contain.

In short, given the totality of the record, we find that the Pollard grievance was submitted in a timely manner.

The Company's No-Fault Attendance Policy

On September 1, 1992, the Company installed its no-fault absentee program. (Company Exhibit 2) A salaried and hourly committee was established to guide Wyandot in the establishment of the new policy. Ironically, Grievant Pollard was a member of the group. It was revised effective January 1, 1993 as a result of the Family Medical Leave Act which became effective on that date. (Company Exhibit 3)

The chief advantage of a no-fault attendance program is that it strips the authority of front-line supervision to determine whether an absence should count against an

employee. When supervision has the power to make such determinations, complaints concerning favoritism, discrimination, or arbitrariness are common. Even though a supervisor makes a good-faith effort to be fair, such criticism is inevitable. To avoid such a state of affairs, an increasing number of firms in the United States have adopted the no-fault system.

The program at Wyandot reflects those found within American industry. It contains essentially the same principles adopted by other employers and unions. At the outset the philosophy of the program is expressed as follows:

> This set of attendance guidelines was developed with input from a team composed of hourly and salaried teammates. Its purpose is to encourage regular and prompt attendance by all teammates, while recognizing that there are occasions that absences will be necessary. It is designed to be fair to all teammates, while rewarding perfect attendance and eliminating excessive absenteeism.

Absences are counted as "occurrences." Thus:

Individual days	1 occurrence/day
Late more than 4 hours	1 occurrence
Late less than 4 hours	1/2 occurrence
Leave Early more than 4 hours	1 occurrence
Leave Early less than 4 hours	1/2 occurrence
No Call/Late Call	1/2 occurrence

Unless an exception is made by the program, no consideration is given to the reason for the absence. As it is said: "An absence is an absence and it counts against the employee."

A teammate (employee) is given seven (7) unpaid occurrences during a twelve (12) month rolling calendar period. These are not charged against the employee. As a matter of fact, no verification of the absence is necessary.

Discipline kicks in with the eighth (8th) occurrence in accordance with a progressive system:

Eighth (8th) occurrence: Warning notice.
From human relations.

Tenth (10th) occurrence: Verbal reprimand.

Twelvth (12th) occurrence: Written reprimand.

Thirteenth (13th) occurrence: Termination of employment.

Beyond the first seven (7) absences, the program makes other exceptions. That is, the employee is absent, but it does not count against the employee. For example, lates or absences due to severe weather and acts of God are exempt. All absences covered by the Labor Agreement, such as jury duty, vacations, and holidays are exempt. Also, all absences approved by the Company under the Family Medical Leave act will not count as an occurrence.

An important exemption involves an illness or injury that goes beyond the first day of absence. That is, an illness or injury that causes multi-days of absence will count only as one (1) occurrence.

Under the program, the employee has an incentive to improve his/her absentee record. Thus:

Perfect Attendance from.....	Teammate shall earn.....
Jan. 1 thru April 30	1 personal day
May 1 thru Aug. 31	1 personal day
Sept. 1 thru Dec. 31	1 personal day

As we view the Wyandot program, it is eminently reasonable taking into account the interests of the employees. As a matter of fact, a previous arbitrator held the program was reasonable.* in other words, should the Grievant prevail in this proceeding, such a decision will not be based on the proposition that the program is inherently unreasonable. Such a decision would be based solely on the way the program was applied to Pollard.

Grievant Pollard's Attendance Record

The following chart demonstrates the Grievant's record which resulted in her discharge under the Company's No-Fault Attendance Policy. (Company Exhibit 4)

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* Arbitrator Phyliss E. Florman. Upholding discharge of Tammy White, January 11, 1995.

Absence Date	
July 17, 1995	Absent – sick
August 1, 1995	Absent – gave no reason
August 17, 1995	Left early – sick
August 21, 1995	Absent – won't be in
October 9, 1995	Absent – won't be in
November 6, 1995	Absent – won't be in
January 8, 1996	Absent – car trouble
February 1, 1996	Absent – court date
February 16, 1996	Left early – less than 4 hours
April 3, 1996	Absent – would not be in
April 12, 1996	Left early – less than four hou
April 15, 1996	Absent – car trouble
April 24, 1996	Late – less than four hours
May 11, 1996	Late – Overslept and was late
May 13, 1996	Absent – would not be in
May 29, 1996	Left early – Headache – with
May 30, 1996	Left early – more than four h couple of hours, to attend a h

Sue Pollard

Reason	Occurrences
	1
	1
	1/2
	1
	1
	1
	1
	1
emaining on a shift	1/2
	1
s remaining on the shift	1/2
	1
	1/2
ess than four hours	1/2
	1
ss than four hours remaining on the shift	1/2
urs before the end of the shift after working only a aring	1/14

Although thirteen (13) occurrences are sufficient for termination, the Company took this action after the fourteenth (14th) occurrence.

Consideration, however, calls into question whether the Company applied its policy in a proper manner. In the first place, there is Pollard's absence of January 8, 1996. The Company claims it was because of "car trouble." Pollard testified, however, that "on January 8, I did not call Phil Johnson, Manager of the shop about my car."

Rather than trouble with her car, the reason for her absence on January 8 was caused by a snowstorm. When the Company refused to excuse employees who failed to report to work on that date, the Union arbitrated that matter. The case was heard by Arbitrator Edward P. Archer. (Union Exhibit 1) Accepted as true, were the facts used by him to reach a decision on Sunday January 8, 140 employees were scheduled to work, and 115 reported on time and 30 did not report to work.

In his decision, Arbitrator Archer ruled in favor of the Union and said " . . . based upon the above analysis of the facts I am persuaded that the Union met that burden. Accordingly, I will hereinafter sustain the grievance."

Given his decision it comes as no surprise that Arbitrator Archer totally rejected the reasons the Company used to support its case, based upon the testimony of Human Resources Manager Holzapfel. Needless to say he found "there is no dispute that there was a snowstorm in the Jeffersonville area where the plant is located."

Where Pollard comes into the picture is that she testified in the Archer hearing, declaring:

> Second shift employee Sue Pollard testified on Sunday, January 8, her car was covered with drifted snow higher than the windows and she couldn't get it out as it covered up as fast as she could clear it.

Wyandot's Attendance Policy exempts as an occurrence "Lates due to severe weather, road conditions, catastrophic or acts of God that impact teammates on a plantwide basis may be excused by the Vice President of the Jeffersonville Division."

Nonetheless, the Company asserts that the Grievant did not work on January 8 because of the snowstorm. It claims her absence on that date was due to trouble with her car. Thus, it says:

> . . . While it was interesting to hear Grievant's "story" at the "snow arbitration", John Holzapfel testified at Grievant's hearing that she called in to report that she couldn't come to work because of "car trouble", and reported nothing whatsoever related to the snow. Thus, having reported "car trouble" as the source for her absence on January 8, Grievant took advantage of the fact that other employees missed work due to heavy snow on the ground by claiming at the "snow arbitration" hearing that the car trouble she experienced was actually a lot of snow on her car. This is ludicrous. (Company Post-Hearing Brief, pp. 31-32)

This clearly conflicts with the Archer award. He did not mention the names of employees covered by his award.* However, he did specifically refer to Pollard's

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* His was a class action proceeding.

testimony in his case that she did not report to work because of the snowstorm. Why would he do that and then exclude the Grievant from the remedy he directed in his decision? That simply is not reasonable.

As Arbitrator Archer found, and we find here:

> The Company acknowledges this language covers absences as well as lateness.

In short, Wyandot charges Pollard with an occurrence for her absence on January 8 in error. She was absent on this day due to a condition counted as an excused absence under the terms of the Company's Attendance Policy.

Absences of February 1 and May 30, 1996

With respect to these dates the Grievant was absent, and she was charged with unexcused occurrences. According to Company Exhibit 4, the reason for her absence was "court." Actually she was absent because she was scheduled to attend a hearing by the Indiana Workers Compensation Board. (Union Exhibit 5)* In its official notice for the February 1, 1996 hearing, the Compensation Board notified Pollard, her attorney, Gary D. Miller, Wyandot and its attorney, Curt J. Angermeier. Such notice established the hearing was to be held at the

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* According to the record, the February 1, 1996 hearing date was cancelled because the Company's attorney, Angermeier, cancelled that date without prior notice to anybody. Not for that, the May 31, 1996 hearing would have been unnecessary. In other words, by cancelling the February 1 date, Wyandot in effect caused Pollard two (2) occurrences.

City-County Building, Jeffersonville, Indiana 47130, on February 1, 1996 at 9:00 A.M. local time.

Such an absence is exempt as an occurrence by the following provision of the Wyandot Attendance Policy:

> All absences otherwise covered by the Union Contract will be exempt from the attendance policy as occurrences, i.e. Jury Duty, Funeral Leave (if paid by the Company), disciplinary suspensions, work-related injuries, vacations, holidays, etc . . .

At one point in Holzapfel's testimony, he said employees are required to attend a court hearing, reasonably including a hearing before the Indiana Workers Compensation Board, would be excused (which is not consistent with a no-fault policy) provided the employee informs the Company of such an event so that arrangements may be made to cover the absence.*

As the company puts it:

> First, Grievant did not receive an occurrence for her absence on May 30 simply because she had a workers' compensation hearing but, rather, because *she never gave the Company advance notice that she would be required to miss work that day*. John Holzapfel testified clearly that, in the past, the Employer has made an exception under the policy (even though it is a "no-fault" policy) when Employees are required to miss work due

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* The absent employee, given some ambiguous testimony by Holzapfel, must find a replacement to cover such an absence. Without exploring this issue in depth, the Arbitrator believes Management must find a replacement and not the employee. Management makes job assignments, not employees.

> to a court date *and the employee gives his/her supervisor advance notice so the supervisor can coordinate work schedules in the employee's absence.* When the Employee notifies the supervisor in advance, the Employee does *not* receive an occurrence. (Emphasis in original) (Company Post-Hearing Brief, p. 33)

With full deference to Wyandot and its Counsel, there was absolutely no need for an employee to advise the Company of a court date (here a hearing before the Indiana Workers Compensation Board) because the government agency in question notifies employers *well in advance of a hearing which an employee may attend.* For the hearing of February 1, 1996, all parties, *including the Employer,* were notified of the hearing on December 7, 1995. (Union Exhibit 5) For the hearing scheduled for May 30, 1996, the notice to all parties, *including the Employer,* was dated April 8, 1996. (Union Exhibit 2) Thus, for the February 1, 1996 hearing, the Employer was notified about *two (2) months* in advance, and likewise for the May 30, 1996 hearing.

Under these circumstances, notification by the employee would be simply redundant. Why was there need for an employee to notify the Company of the session when the Indiana Workers Compensation Board notified the Employer *about two (2) months prior to the hearing*? Why did Wyandot need two (2) notices?

CONCLUSION AND AWARD

A few additional comments may be in order to place this decision in its correct perspective. The Company

stresses that Pollard did not file grievances for the reprimands she was issued: August 5, 1995, November 14, 1995, February 6, 1996, and May 14, 1996. Given a No-Fault Attendance Policy, this does not bear on the outcome of this case. A reprimand would be of significance only if it deals with the thirteen (13) occurrences. That she did not file grievances to protest the previous reprimands does not prejudice her position in this proceeding. If the Company did not establish a no-fault system, the failure to file grievances to protest previous reprimands could be of real significance.

The Company asserts "that Pollard stands guilty of 'Mondayitis.' " Thus:

> It is particularly noteworthy that no less than *seven* of Grievant's totals of 14 occurrences resulted from "Mondayitis". Grievant's absences of July 17, August 21, October 9, and November 6, 1995, and January 8, April 15 and May 13, 1996 were for the reasons that she was "sick", "won't be in", and "car trouble". (Emphasis in original) (Company Post-Hearing Brief, pp. 26-27)

Even the Company concedes:

> . . . Clearly half of her 14 occurrences involved "Mondayitis" – she simply didn't want to go to work on seven Mondays. Of course, under a "no-fault" attendance program, that was Grievant's prerogative . . . *Ibid.*, p. 35)

Though there is virtue to no-fault systems, there is a downside as well. Employers risk the possibility that some employees will take mini-vacations or a three (3) day weekend holiday.

Without reservations, the Arbitrator agrees to the following Company contention:

> The Employer respectfully submits that it would be a waste of time and paper to cite authority for the proposition that an Employee may not attack prior unchallenged discipline simply because it represents a link in the progressive discipline chain leading to ultimate termination. If a particular instance of discipline is not grieved and is unchallenged, it becomes final and binding, and the disciplined party is estopped from debating the discipline further down the road should it lead to further discipline. That is exactly what happened here. (Company Post-Hearing Brief, pp. 30-31)

Whatever happened in the past remains in the past, and it may not be revived for any labor relations matter. In the case at hand, the Union actually does not seek to revive any issue disposed of by any previous reprimand.

Nor does the Arbitrator violate the parameters of his authority as established by Section 6.7 of the Labor Agreement. In no way has he ignored, added to, or modified any terms or provisions of the contract. The core of his decision simply is that the Employer failed to apply the occurrence standard in a proper manner. It charged Pollard with three (3) occurrences which she did not deserve.

Given the No-Fault Attendance Policy, the Company's attempt to attack Pollard's credibility about the reasons for her occurrences has no standing in this proceeding.

Only one (1) issue is involved in this case: Did Wyandot apply its No-Fault Attendance Policy in a proper manner? The answer is a resounding NO because it charged her with three (3) instances not supported by the evidence.

Contrary to the Company's position, the Union advised the Company of its intention to arbitrate Pollard's grievance in a timely manner. In its letter to Wyandot on July 1, 1996 the Union expressly informed it that *"Local 227 is submitting the grievance to arbitration,"* and *"this letter is the Union's final notice of its intent to arbitrate this grievance."* (Emphasis supplied)

How could the Union be more clear to alert the Employer that it intended to arbitrate the Pollard grievance? Unless words do not mean what they clearly say, no question exists that Local 227 put the Company on clear and early notice of its intent to arbitrate the Pollard grievance.

In regard to the merits of this case, the evidence clearly demonstrates that the Company in error charged Pollard with occurrences on January 8, February 1, and May 30, 1996. Thus, her occurrences are reduced by three (3) giving her an occurrence total of eleven (11) effective May 30, 1996. Thus, the Company discharged her improperly under the Wyandot Attendance Policy and without just cause under Article 8.

Given this analysis of the evidence, Wyandot discharged the Grievant capriciously and in bad faith.

In light of these findings, the Company is directed to reinstate Pollard to her job within two (2) days after

receipt of this Award and to make her whole for all wages and contractual benefits she lost during the period of her wrongful termination.